
(2015) 08 KL CK 0021
In the High Court Of Kerala
Case No : W.P. (C) No. 3450 of 2014

Dhanyamo

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 17-08-2015

Acts Referred:

Constitution of India, 1950 — Article 14, 15, 15(1), 15(2), 15(3)
Punjab Excise Act, 1914 — Section 30

Citation : (2016) 1 ILR (Ker) 290 : (2015) 4 KHC 791 : (2016) LabIC 17

Hon'ble Judges : Dama Seshadri Naidu, J.

Bench : Single Bench

Advocate : Thomas Abraham, Advocate, for the Appellant

Final Decision : Allowed

Judgement

Dama Seshadri Naidu, J.

Introduction:

1. It is an issue of judicial invalidation of Legislation: Rule 27A of the Foreign Liquor Rules is impugned as being violative of Articles 14 , 15(1) & (3), 16(1) and 19(1)(g) of the Constitution of India. Uncluttered by statutory references, the issue is whether a woman can be deprived of employment solely on the ground of the alleged disadvantage she suffers from owing to her gender. In the present instance, women are sought to be discriminated against because of their sex, and nothing else.

Facts in Brief:

The petitioners, working as waitresses/restaurant assistants in a bar attached to a hotel in Trivandrum, faced the threat of termination from their employment with the introduction of a new Rule governing the Bars attached to hotels. As per the amendment of the Foreign Liquor Rules notified as SRO No. 959/2013 dated 09/12/2013, a new rule as Rule 27A is incorporated prohibiting women from

being employed "in any capacity for serving liquor on the licensed premises". In terms of the same notification, in Form FL-3 under the heading "Conditions", a new condition has been incorporated as condition No. 9A which also contains the same prohibition for engaging women in the Bars. The *raison d'être* for the introduction of Rule 27A of the Rules and the consequential procedural measures is that the Government has received complaints that women are being employed to serve liquor in the licensed bars.

2. Both the petitioners, who are working as waitresses or bartenders in an FL-3 licenced hotel, have a grievance that if the newly incorporated rule is allowed to hold its field, the petitioners are bound to lose their jobs and, thus, their livelihood. The petitioners do aver that their employer has already informed them that the management is not able to provide them any other employment in the hotel, and that they are bound to be terminated very soon. The petitioners' Ext. P5 representation, submitted to the respondents 1 to 3, does not seem to have evoked any response.

3. Thus, both the petitioners, being the bread-winners of their families with children and elder members to be supported, challenge Rule 27A of the Rules as being ultra vires of the Executive, especially in the face of Articles 14 , 15(1) & (3), 16(1) and 19(1)(g) of the Constitution of India.

Summary of Submissions:

4. Mr. Thomas Abraham, the learned counsel for the petitioners, has submitted that the "conceptual change" of employment has advanced the status of women in the society at large, and any stray incidents of violence against women in their workplace or elsewhere is not at all a valid reason for keeping them away from any employment.

5. He further contends that no restriction can be imposed on the basis of gender against any person working in a star hotel either as per the norms/conditions fixed for its classification or under the FL-3 licence or any other law in force. According to the learned counsel, there have been no complaints whatsoever regarding any misbehaviour by any customer towards the women employees working in the licensed premises. When tourism is aggressively promoted, the need for involving women in the hospitality industry cannot be overemphasized.

6. The Government's avowed objective in bringing about the statutory changes in depriving the women of their employment opportunities, according to the learned counsel, is entirely on a misplaced assumption of its role as *parens patriae*. The governmental policy, in essence, is myopic and archaic, contends the learned counsel.

7. The learned counsel has also contended that the issue raised in the present writ petition has been squarely covered by the decision of the Hon"ble Supreme Court in *Anuj Garg and Others Vs. Hotel Association of India and Others*, . He has also placed reliance on *Ms. Githa Hariharan and Another Vs. Reserve Bank of*

India and Another, wherein the Apex Court has adverted to the Convention on the Elimination of All Forms of Discrimination against Women, 1979 ("CEDAW") which was adopted in 1979 by the UN General Assembly. In the course of his submissions, the learned counsel has also referred to United States v. Virginia, 518 US 515 (1996) and A.N. Rajamma Vs. State of Kerala and Others--> .

8. It is the specific contention of the learned counsel that by incorporating the impugned rule by amending the Foreign Liquor Rules, through SRO No. 959/2013 dated 9/12/2013, the Government, in effect, is taking away the equality of status and opportunity that is guaranteed to the women in the Constitution of India. It is, according to him, a state-sponsored discrimination. The learned counsel, sounding rhetorical, has submitted that with the enforcement of the impugned rule, the Government has been laying to waste welfare Legislations like the Commission of Sati (Prevention) Act, 1987, the Equal Remuneration Act, 1976, National Commission for Women Act, 1990, the Hindu Marriage Act, 1955 (28 of 1989), the Indecent Representation of Women (Prohibition) Act, 1986, the Hindu Succession Act, 1956, the Dowry Prohibition Act, 1961, etc.

9. The learned counsel for the petitioners has also referred to the Preamble of the Universal Declaration of Human Rights to buttress his submissions. After referring to various other international covenants and treaties, the learned counsel has eventually summed up his submissions by saying that the impugned Rule is ex facie discriminatory and ultra vires of the Government, the Executive.

Respondents":

10. The learned Government Pleader, in the absence of any counter-affidavit having been filed, has initially submitted that the Government has brought about the statutory changes only with a view to protecting the women from being exposed to dangers in workplaces. He has further submitted that even in Bars and restaurants women have not been prohibited from being engaged except as bartenders. According to him, it amounts to neither discrimination against nor deprivation of employment to women. He has, nevertheless, submitted that in the light of the decision rendered by the Apex Court in Anu Garg, this Court may decide the issue on hand.

Discussion:

11. The Abkari Act is a pre-independence piece of Legislation initially enacted on 05/08/1902 by the principality of Cochin; it was, later, made applicable to the whole of Kerala as per Act 10 of 1967, which received the Presidential assent on 29/07/1967. It is, as the Preamble reads, a consolidating and amending act relating to the import, export, transport, manufacture, sale and possession of intoxicating liquor and intoxicating drugs in the State of Kerala. Section 10 of the Act deals with the transportation of liquor or any other intoxicating drug; Section 24, with the forms and conditions of licences, etc., whereas Section 29 delegates to the Government the legislative power of making rules.

12. As a part of the delegated Legislation, the Government of Kerala, tracing its powers to Sections 10, 24 and 29 of the Act, has framed the Foreign Liquor Rules with effect from 01/04/1953. The fulcrum of the rules being Rule 13, it deals with the licences for possession, use or sale of foreign liquor. Rule 27 of the Rules prohibits the sale or transport of liquor by persons suffering from leprosy or any contagious disease and the employment of such persons in shops for the sale of liquor.

13. Through GO (P) No. 204/2013/TD, dated 09/12/2013, the Government of Kerala has amended the Foreign Liquor Rules by engrafting Rule 27A, which reads as follows:

"27A. No woman shall be employed in any capacity for serving liquor in the licenced premises."

14. Further, in Form FL3, under the heading "Conditions", after Condition No. 9, the following condition has been inserted:

"9A. No woman shall be employed in any capacity for serving liquor in the licenced premises."

15. The explanatory note appended to the Government Order, though indicated to be not part of the notification, reads to the effect:

"The Government have received various complaints that women are being employed in licensed premises for serving liquor to their customers. For prohibiting such practices, the Government have decided to amend the Foreign Liquor Rules..."

16. In the first place, neither the principal Legislation, the Abkari Act, nor the secondary Legislation, namely the Foreign Liquor Rules, prohibits the employment of women in any liquor outlets, especially the FL-3 licenced premises-now, in the light of the change in the Governmental policy, exclusively five-star hotels. In the light of this fact, the question of the Government receiving complaints about the hotel establishments employing women in any capacity, especially for serving liquor, is not, by any reckoning, of much consequence. The Government, however, presupposes that employing women to serve liquor in the licenced premises is illegal. Since this presumed illegality needs some statutory support, the Government has brought about the impugned Government Order. Curious as it may sound, first, the Government brands something illegal, without any statutory base, though; and subsequently brings about justification by amending the Rules. The approach of the Government is a classic case of begging the question.

Constitutional Justification:

17. Raymond F. Gregory in his book *Women and Workplace Discrimination: Overcoming Barriers to Gender Equality* (2003, Rutgers University Press) has narrated the course of discriminatory or even anti-canon judgments rendered by

the American Supreme Court as regards the gender equality, or rather inequality, especially in workplaces. Illinois was one of many states that barred felons and women from becoming lawyers. In 1872, the Supreme Court in *Bradwell v. Illinois* 83 US 130 (1872), affirmed Illinois's rejection of Myra Bradwell's application for a license to practice law in the state and took the opportunity to fix women's proper place in society:

The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organisation, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.

18. To make certain that all citizens understood women's proper place, the Court added:

"The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator."

19. Let us move a few years ahead and see how the American Supreme Court reacted to differential Legislation vis-a-vis the women: In *Muller v. Oregon* , 208 US 412 (1908) , the US Supreme Court has held that differentiated from the other sex, a woman is properly placed in a class by herself, and Legislation designed for her protection may be sustained, even when like Legislation is not necessary for men, and could not be sustained. It is impossible to close one's eyes to the fact that she still looks to her brother and depends on him. This difference, according to the US Supreme Court, justifies a difference in Legislation and upholds that which is designed to compensate for some of the burdens that rest upon her.

20. A few more years later, we may still examine the judicial thinking in an advanced country like the USA. As recently as in 1948, the American Supreme Court persisted with its conviction that women are dependent upon men. In *Goesaert v. Cleary* , 335 US 464 (1948) , upheld a Michigan Statute that barred a woman from employment as a bartender unless the male owner of the bar was either her father or her husband. Ironically, the leading opinion was rendered by none other than Mr. Justice Frankfurter. The learned Judge has observed that Fourteenth Amendment did not tear history up by the roots, and the regulation of the liquor traffic is one of the oldest and most untrammelled of legislative powers.

21. If we examine the litigation the gender issue has engendered across the Atlantic, in *Roberts v. Hopwood* 1925 AC (578) a metropolitan borough council had decided to pay its workers a minimum of ?4 a week, whether they were men or women and regardless of the job they did. The House of Lords approved the

district auditor's surcharge for being overly gratuitous, given the fall in the cost of living. Lord Atkinson said:

"[t]he council would, in my view, fail in their duty if... [they] allowed themselves to be guided in preference by some eccentric principles of socialistic philanthropy, or by a feminist ambition to secure the equality of the sexes in the matter of wages in the world of labour."

Though Lord Buckmaster, dissenting, said:

"Had they stated that they determined as a borough council to pay the same wage for the same work without regard to the sex or condition of the person who performed it, I should have found it difficult to say that was not a proper exercise of their discretion."

22 As can be seen from the ABC of Women Workers' Rights and Gender Equality (Pp. 8 & 9, 2nd Ed. International Labour Officer, Geneva), discrimination on the grounds of sex is a major form of discrimination, and has been a focus of attention for the international community since the Second World War. The protection and promotion of women workers' rights have always been integral to the ILO's mandate. The employment of women before and after childbirth was the subject of one of the ILO's first Conventions, dating from 1919, the very first year of the Organisation's life. Convention No. 100, by guaranteeing equal pay for work of equal value, opened the door to the examination of structural gender biases in the labour market. Since then, there has been a gradual shift in emphasis from protecting women to promoting equality and improving the living and working conditions of workers of either sex on an equal basis. It can be seen, for instance, in the replacement of the Employment (Women with Family Responsibilities) Recommendation, 1965 (No. 123) by the Convention No. 156.

23. In the new millennium, new and revised labour standards reflect the overarching goal of decent work, which now underpins all the ILO's activity. Gender equality is central to this goal. From the early 1980s, the focus of analysis concerning equality, in general, was reoriented from women to relations between women and men. As a result, the conviction has gained ground that any change in the role of women should be accompanied by a change in that of men; it should be reflected in their greater participation in family and household duties. By this thinking, Convention No. 156 and its accompanying Recommendation No. 165 concerning workers with family responsibilities were adopted in 1981. These instruments apply to men as well as women with responsibilities for dependent children or other members of their immediate family and are intended to facilitate their employment without discrimination resulting from such family responsibilities.

24. As per the World Bank statics, by 2010 India had only 19% of its workforce in non-agricultural sector drawn for women. Indeed, as a signatory to the Convention on the Elimination of Discrimination against Women (CEDAW) and the UN Convention on the Rights of the Child (CRC), India has a number of

progressive laws that support gender equality and ending discrimination and violence against women.

25. The Government of India was represented at the 2013 session of the Commission on the Status of Women (CSW), where the Member States committed to ending all forms of violence against women. They recognized that there was a need to address the economic and political underpinnings of violence, ensure access to justice, strengthen multi-sectoral approaches, and end harmful traditional practices that negatively impact women.

26. In *Gita Hariharan (Supra)*, the Hon"ble Supreme Court has observed that India is a signatory to the Convention on the Elimination of All Forms of Discrimination against Women, 1979 ("CEDAW") and the Beijing Declaration, which direct all State parties to take appropriate measures to prevent discrimination of all forms against women. The domestic Courts are under an obligation to give due regard to International Conventions and Norms for construing domestic laws when there is no inconsistency between them.

27. Article 15 of the Constitution prohibits discrimination on grounds of religion, race, caste, sex or place of birth. In fact, Article 15(1) enjoins a particular application of the general principle of equality enshrined in Article 14 of the Constitution of India, the fountainhead of fraternity and equality. While Article 15(1) mandates the State in general terms not to indulge in any form of discrimination, Clause (2) thereof particularises it in relation to the citizens. There is no gainsaying the fact that the combined effect of Article 14 and 15 of the Constitution of India does not provide any blanket ban against passing unequal laws; there can, in fact, be laws progressively discriminatory. However, the laudability of the objective behind the seemingly discriminating law does not suffice; on the other hand, the validity is to be judged by the method of its operation and its effect on the fundamental rights of a citizen. It is further noteworthy that Article 15(2) is horizontal in its application, thus not confining itself to the State alone.

28. As can be seen, Articles 15(3) & (4) constitute the exceptions to Articles 15(1) & (2). Especially Article 15(3) expressly permits the State from making any special provision for women and children. The provision, thus, is in the nature of a proviso qualifying the general guarantees contained in Articles 14 , 15(1) , (2) and 16(1) & (2) of the Constitution. There is no cavilling as regards the proposition that the protective discrimination in favour of women under Article 15(3) of the Constitution extends to the entire field of state activity, including that of public employment, which, in fact, has been specifically dealt with under Article 16 of the Constitution of India. In essence, the discrimination can be in favour of but not against the women, whose socio-economic backwardness needs no further emphasis. Article 15(3) of the Constitution of India, after all, is an enabling provision to empower the women.

29. In *Govt. of Andhra Pradesh Vs. P.B. Vijaykumar and another*, the Hon"ble

Supreme Court has examined the importance and the impact of Article 15(3) in the backdrop of Articles 15(1) & (4) and 16(1) of the Constitution and has held thus:

"7. The insertion of Clause (3) of Article 15 in relation to women is a recognition of the fact that for centuries, women of this country have been socially and economically handicapped. As a result, they are unable to participate in the socioeconomic activities of the nation on a footing of equality. It is in order to eliminate this socio-economic backwardness of women and to empower them in a manner that would bring about effective equality between men and women that Article 15(3) is placed in Article 15 . Its object is to strengthen and improve the status of women. An important limb of this concept of gender equality is creating job opportunities for women. To say that under Article 15(3) , job opportunities for women cannot be created would be to cut at the very root of the underlying inspiration behind this article. Making special provisions for women in respect of employment or posts under the State is an integral part of Article 15(3) . This power conferred under Article 15(3) , is not whittled down in any manner by Article 16 ."

30. The Court has further observed:

"8. What then is meant by "any special provision for women" in Article 15(3) ? This "special provision", which the State may make to improve women's participation in all activities under the supervision and control of the State can be in the form of either affirmative action or reservation. It is interesting to note that the same phraseology finds a place in Article 15(4) which deals with any special provision for the advancement of any socially or educationally backward class of citizens or Scheduled Castes or Scheduled Tribes."

31. In *Ms. Githa Hariharan and Another Vs. Reserve Bank of India and Another*, the Apex Court has referred to the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 ("CEDAW") and the Beijing Declaration, which direct all State parties to take appropriate measures to prevent discrimination of all forms against women. Acknowledging the fact that India is a signatory to CEDAW having accepted and ratified it in June 1993, a three-Judge Bench of the Hon'ble Supreme Court has further observed that the domestic Courts are under an obligation to give due regard to international conventions and norms for construing domestic laws when there is no inconsistency between them.

Anuj Garg:

32. In *Anuj Garg and Others Vs. Hotel Association of India and Others*, , what fell for consideration was the Constitutional validity of Section 30 of the Punjab Excise Act, 1914 prohibiting employment of "any man under the age of 25 years" or "any woman" in any part of such premises in which the public consume liquor or intoxicating drug. The Court has observed that right to be considered for employment subject to just exceptions is recognised by Article 16 of the

Constitution. Right of employment itself may not be a fundamental right but in terms of both Articles 14 and 16 of the Constitution of India, each person similarly situated has a fundamental right to be considered therefor.

33. As regards the ascendancy of women in the sphere of public employment, the Apex Court has observed that when a discrimination is sought to be made on the purported ground of classification, such classification must be founded on rational criteria. The criteria in the absence of any constitutional provision and, it will bear repetition to state, having regard to the societal conditions as they prevailed in early 20th century, may not be a rational criteria in the 21st century. In the early 20th century, the hospitality sector was not open to women in general. In the last 60 years, women in India have gained entry in all spheres of public life. They have also been representing people at grassroots democracy. They are now employed as drivers of heavy transport vehicles, conductors of service carriages, police etc. Women can be seen to be occupying Class IV posts to the post of a Chief Executive Officer of a multinational company. They are now widely accepted both in the Police as also Army services.

34. Eventually, examining what is said to be fundamental tension between right to employment and security, their Lordships have held as follows:

"34. The fundamental tension between autonomy and security is difficult to resolve. It is also a tricky jurisprudential issue. Right to self-determination is an important offshoot of gender justice discourse. At the same time, security and protection to carry out such choice or option specifically, and state of violence-free being generally is another tenet of the same movement. In fact, the latter is apparently a more basic value in comparison to right to options in the feminist matrix.

35. Privacy rights prescribe autonomy to choose profession whereas security concerns texture methodology of delivery of this assurance. But it is a reasonable proposition that the measures to safeguard such a guarantee of autonomy should not be so strong that the essence of the guarantee is lost. State protection must not translate into censorship.

36. At the same time we do not intend to further the rhetoric of empty rights. Women would be as vulnerable without State protection as by the loss of freedom because of the impugned Act. The present law ends up victimising its subject in the name of protection. In that regard the interference prescribed by the State for pursuing the ends of protection should be proportionate to the legitimate aims. The standard for judging the proportionality should be a standard capable of being called reasonable in a modern democratic society.

37. Instead of putting curbs on women's freedom, empowerment would be a more tenable and socially wise approach. This empowerment should reflect in the law enforcement strategies of the State as well as law modelling done in this behalf.

38. Also with the advent of modern State, new models of security must be developed. There can be a setting where the cost of security in the establishment can be distributed between the State and the employer."

(emphasis original)

35. As to the constitutional validity of Section 30 of the Act, the Court has observed that its task is to determine whether the measures furthered by the State in the form of legislative mandate to augment the legitimate aim of protecting the interests of women are proportionate to the other bulk of well-settled gender norms such as autonomy, equality of opportunity, right to privacy, etc. The bottom line in this behalf would be a functioning modern democratic society which ensures freedom to pursue varied opportunities and options without discriminating on the basis of sex, race, caste or any other like basis. In fine, there should be a reasonable relationship of proportionality between the means used and the aim pursued.

36. Eventually, the Court has quoted with approval the peroration of Ginsburg, J., in *United States v. Virginia*, 518 US 515 (1996) which is worthy of reproduction, and which reads as follows:

"The heightened review standard our precedent establishes does not make sex a proscribed classification. Supposed "inherent differences" are no longer accepted as a ground for race or national origin classifications. Physical differences between men and women, however, are enduring. "Inherent differences" between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity. Sex classifications may be used to compensate women "for particular economic disabilities [they have] suffered", to "promote equal employment opportunity", to advance full development of the talent and capacities of our nation's people. But such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women."

(as quoted in *Anuj Garg* (Supra))

37. The upshot of the above disposition in *Anuj Garg* is that the Hon'ble Supreme Court has affirmed the judgment of the Hon'ble Punjab & Haryana High Court, which declared Section 30 of the Punjab Excise Act, 1914 unconstitutional.

38. This Court as far back as in 1976 has held in an unreported judgment in OP No. 5080 of 1976 to the following effect:

"We in this country carry with us, to a considerable extent, our conventional thinking and attitude to social life despite modern trends in the approach to individual freedom and right to equality. Our people, and particularly the Hindus and the Muslims who constitute a large proportion of the population have been conditioned over a long period of time to view woman as subordinate to the authority of her man, as one not equal to man in physical prowess and capacity

for physical endurance. The Constitution of our nation reflects civilized thinking and assures women their rightful place as citizens of this country. But despite such solemn guarantee there are many areas where she has yet to gain equality with the male. Despite resolutions at International Conferences highlighting the need for a fairer treatment to the fair sex there are areas where law has not still stepped in to remove the disabilities of women and the anomalies in the social set up. We have recently observed the International Year of the Women but its impact, in terms of positive gains is yet to be assessed."

(as quoted in A.S. Rajamma (infra))

39. In A.N. Rajamma Vs. State of Kerala and Others--> the issue is concerning denial of appointment of women candidates in the select list for appointment in the last grade service on the ground that they are women incapable of performing arduous physical tasks. Having observed that not much of case law in the Indian Courts on the question of discrimination against women is available, a learned Division Bench of this Court, after referring to copious case of American and English Courts, has held as follows:

"34. Remembering what the practical consequence of the attitude of the Government has been, namely that for one reason or other not a single woman has been advised to any one of the 260 posts we find that this is a clear case of discrimination, a discrimination which falls not within Article 14 of the Constitution only, but also within the specific prohibition in Article 15(1) of the Constitution. The mandate to the State that it shall not discriminate against any citizen on grounds only of sex is one of the most important fundamental rules that calls for strict observance. In the framing of any Statute or law or the making of subordinate Legislation by a delegated legislative authority this is a fundamental rule which, under no circumstances, would bear violation. Unlike the freedoms in Article 19 of the Constitution there is no Scope for restricting the absolute scope of the rights under Article 15(1) of the Constitution. There would be no scope whatever to justify differentiating between the male and female sexes in the matter of appointment. The right of women should not be denied on fanciful assumptions of what work the woman could do and could not do. Whether the work is of an arduous nature and, therefore, unsuitable for women must be decided from the point of view of how women feel about it and how they would assess it..."

It needs no much cogitation to hold that Rule 27A of Kerala Foreign Liquor Rules as well as condition 9A under the head Conditions in Forms FL 3 fall foul of the Constitutional scheme of gender equality as has been spelt out in Articles 14 , 15(1) & (2) and 16(1) & (2) of the Constitution of India. It is accordingly held.

As a result, the writ petition is allowed. No order as to costs.